Petition

Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

81-910

No. .....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JACK BERGMAN, Warden

Petitioner,

v

ARTHUR JACKSON BURTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Assistant Attorney General
525 West Ottawa Street
762 Law Building
Lansing, Michigan 48913
(517) 373-1124

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1981

QUESTIONS PRESENTED FOR REVIEW

I. Where no timely objection was made to the state court's jury instructions as required by state law, the state appellate courts arguably relied on the failure to object in affirming the conviction and neither cause for the failure to object nor actual prejudice has been shown, is this state prison inmate barred from challenging the state court's jury instructions in federal habeas corpus proceedings under the doctrine of *Wainwright* v *Sykes*, 443 US 72 (1977)?

II. Should *Sandstrom* v *Montana*, 442 US 510 (1979) be applied retroactively to a 1975 state court conviction?

III. If *Sandstrom* is to be applied retroactively, do the state court's jury instructions in this case violate the *Sandstrom* doctrine?

IV. If the state court's jury instructions in this case violate *Sandstrom*, is the violation nevertheless harmless beyond a reasonable doubt under the doctrine of *Chapman* v *California*, 386 US 18 (1967)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

INDEX OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES & COURT RULES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION CONCERNING THE APPLICABILITY OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO A SITUATION WHERE NO TIMELY OBJECTION TO JURY INSTRUCTIONS WAS MADE AT THE TRIAL, AND THE STATE APPELLATE COURT MAY NOT HAVE RELIED SOLELY UPON THE FAILURE TO OBJECT AS A BASIS FOR AFFIRMING THE CONVICTION 12

II. THE POSSIBLE RETROACTIVITY OF SANDSTROM v MONTANA, 442 US 510 (1977), PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHICH THE COURTS OF APPEALS ARE IN CONFLICT AND WHICH SHOULD BE DECIDED BY THIS COURT 15

Page

III. THE NECESSITY OF RECONCILING SANDSTROM v MONTANA, 442 US 510, WITH CUPP v NAUGHTEN, 414 US 141 (1973), AND THE PROPER APPLICATION OF THE HARMLESS ERROR DOCTRINE OF CHAPMAN v CALIFORNIA, 386 US 18 (1967), PRESENT IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT 16

CONCLUSION 17

APPENDIX

INDEX OF AUTHORITIES

Cases	Page
Burton v Bergman, 649 F2d 428, (CA 6, 1981)	2, 13, 15, 17
Chapman v California, 386 US 18 (1967)	16, 17
Cupp v Naughten, 414 US 141 (1973)	16, 17
Dietz v Solem, 640 F2d 126 (CA 8, 1981)	15
Francis v Henderson, 425 US 536 (1976)	13
Hockenbury v Sowders, 620 F2d 111, 115 (CA 6, 1980)	14
People v Burton, Mich App 25591 (February 9, 1977)	1
People v Burton, 400 Mich 827 (1977)	1
Sandstrom v Montana, 442 US 510 (1979)	15, 16, 17
Stovall v Denno, 388 US 293, 296-297 (1967)	15
United States v Spiegel, 604 F2d 961 (CA 5, 1979) *cert den* 446 US 935 (1980)	15
Wainwright v Sykes, 433 US 72 (1977)	12, 13, 14

Statutes:

28 USC § 1254(1)	2
28 USC § 2241	3
28 USC § 2254	3
MCLA 750.83; MSA 28.278	2
MCLA 796.26; MSA 28.1096	2, 12

Court Rules:

Mi GCR 1963, 516.2	3, 12

No. .....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JACK BERGMAN, Warden

Petitioner,

v

ARTHUR JACKSON BURTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

On July 22, 1975, Respondent Burton was convicted by a jury in the Recorder's Court in the City of Detroit, Michigan of assault with intent to commit murder. He was subsequently sentenced to life imprisonment. The conviction was affirmed in an unreported memorandum opinion by the Michigan Court of Appeals, *People* v *Burton*, Mich App 25591 (February 9, 1977), a copy of which is appended to this Petition, Appendix 1a. The Michigan Supreme Court denied leave to appeal without opinion, *People* v *Burton*, 400 Mich 827 (1977). Respondent sought a writ of habeas corpus but in an opinion and order dated February 4, 1980, the United States District Court for the Eastern District of Michigan denied relief. Appendix 2a. In a divided opinion on May 21, 1981, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case for issuance of a writ of habeas corpus unless the state retried respondent within a reasonable period

of time. *Burton* v *Bergman*, 649 F2d 428, (CA 6, 1981) Appendix 8a. The State of Michigan filed a timely motion for rehearing with suggestion for rehearing en banc which was denied in an order filed July 20, 1981, Appendix 20a.

JURISDICTION

The opinion of the Court of Appeals which the state seeks to have reviewed was entered May 21, 1981. Following a timely petition for rehearing, the Court of Appeals denied rehearing in an order filed July 20, 1981. This Court's jurisdiction is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

MCLA 750.83; MSA 28.278:

> Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony punishable by imprisonment in a state prison for life or any number of years.

MCLA 769.26; MSA 28.1096:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Michigan General Court Rules 1963, 516.2:

> Objections. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

In this habeas corpus proceeding in which the District Court's jurisdiction in the first instance was based upon 28 USC §§ 2241, 2254, the Court of Appeals held that the state court's jury instructions may have relieved the state of its obligation to prove the requisite intent beyond a reasonable doubt.

Respondent Burton was charged with and convicted of assault with intent to commit murder.

The testimony of the complaining witness, Debra Boulley, indicates that she and Respondent Burton had previously dated each other and that in 1970 she had a child by him, Julie Ann Boulley. Trial Transcript pp 34-35. She testified, TT p 35 that on the afternoon of November 29, 1973, she and her daughter were alone at the home of her parents when Burton came over and sought to speak to her. By means of a ruse, Burton convinced Ms. Boulley to open the side door and then he forced his way in and held a gun to her head. TT pp 38-39. A short time later, he put the gun down and removed the bullets, at which time Ms. Boulley grabbed her daughter and attempted to go into the bathroom and close the door. She was unable to do so because Respondent pushed the door open and stabbed her with a pen knife at least 30 times on the

neck, chest and arms and when she fell to the floor, he stabbed her in the back. TT pp 40-42. He left her for a short time, ransacked the house, TT pp 42-43, and then returned. Ms. Boulley testified as follows, TT pp 43-45:

"Q. And what happened when he came back? Were you still in the bathroom, by the way?

"A. Yes. I was unable to move.

"Q. And what happened when he came back?

"A. He bent over and he asked me if I was still alive. And I think he put his hand by my mouth, and he said I wasn't dead yet. And he said that he was going to choke me. And I said not—you know, I was begging him not to do it, just leave me alone. Then he started stabbing me again.

"Q. Where did he stab you this time?

"A. In the back.

"Q. Do you know many times?

"A. About eight times.

"Q. All right. And what happened after he stabbed you about eight times that time?

"A. He kept—he was talking to me. He kept asking me if I wanted my daughter to come with me. And that he could kill her, too. And I begged him not to. Leave her alone. To leave me alone. And he just kept talking.

"• • •,

"Q. [By the prosecuting attorney] What happened after he was talking to you?

"A. He picked me up, and he carried me into the back bedroom and he laid me down on the bed. And he said if I really wanted to live that he would let me as long as I didn't tell anybody what happened. He said that nobody would know it was him.

"Q. What did you say, if anything?

"A. And I said, you know. I would do anything if you just let me live.

"Q. What happened then?

"A. He said if I—he would call the ambulance, and if I, you know, if I would swear that I would never, you know, tell anybody that he did it."

Ms. Boulley testified that she gave a false story to the police because of her fear of Burton's threats to kill her and her daughter. She testified that he repeated threats both in person at the hospital and later in letters she received from him. TT pp 46-49. It was not until many months later, in May, 1974, when Respondent was incarcerated that Ms. Boulley felt safe enough to tell the police the true story of the assault. TT p 49.

At the trial Respondent Burton did not testify, and the defense theory, as enunciated in defense counsel's closing argument, TT p 357, was simply that the prosecution had failed to prove its case.

In his instructions to the jury, the Court correctly informed the jury about the defendant being presumed innocent, the concept of reasonable doubt, and the prosecution's burden of proving each element of the offense. In defining the elements of the offense, the Court used examples to help explain that intent could be inferred from the surrounding circumstances, TT pp 374-378, 382-386:

"Now what does the word intent mean in the law? The word intent means a determination with which a person acts. It's a state of mind which is rarely, as you say, acceptable [susceptible] to direct proof but must ordinarily be inferred from the facts or the acts.

"Now what am I talking about? It means this: that you or I—I don't think anybody can look into a person's mind and see what he is thinking about. Some people say they can do that. They look down in a crystal ball and they can tell you what somebody is thinking about. Well I don't believe that. Maybe they can. There had been profits [prophets], but I don't think in every day life just everybody can do that. So how do you determine a person's intent? And it states right here. You may infe[r] from what is said and what is done. Now that's a sure-fire proposition. You take into consideration what the person says, and what the person does, and you ought to be able to determine what his intent is.

"For instance, if I had a gun—you will have to excuse me, Mr. Wyse, you[']r[e] the object today—And I pointed it at his toe and I actually shot him in the toe. I would think that would indicate that I intended to hurt him but not to kill him.

"Now let's say I took that gun and I aimed it at his head and I pulled that trigger. Now I think the intend [intent] there would be to kill him, to get rid of him. And that's what I mean by considering the acts and the words of a person in determining what that person intends to do.

"• • •

"Now I told you what malice is. That's the intentional doing of a wrongful act without justification or cause.

"Now what is express malice? That is actual malice, malice in fact. And it is deliberate intention to commit an injury, evidenced by external circumstances. There again you go by what was done, and what was said. The totality of the circumstances.

"Now what is implied malice? It is that type of malice which maybe inferred by legal reasoning and necessary deduction from the things done.

"Now I am reading here. It says res gestae. That's a high-sounding word, but all that means is the things that were done. So if you define it and place it in, you will get this: it's legal reasoning and necessary deduction from the things done, or the conduct of the party. And its that type of malice that might be inferred in any deliberate, cruel act committed by one person against another, however sudden. Now that's implied malice. One is actual and the other one you may infer from what was done or what was said.

"Now I have tried to explain that as best I could. As I have told you, I have defined the words that I thought needed defining and put it in the definition, and I hope you have understood that.

"In the State of Michigan when a person is charged with a crime, that person doesn't have to say anything, he doesn't have to do anything. All he has to do is to come to court and conduct himself properly, and that's all. He does not have to prove himself innocent.

"It is the duty of the prosecution to prove a person guilty beyond a reasonable doubt. There is a presumption that exists that the defendant is innocent. That's a presumption.

"Now that presumption maybe overcome by the prosecution by presenting competent evidence, or physical evidence, or testimony, or the law. And that presumption attaches at the outset of a trial. It abides with the defendant right now, because the trial isn't over. And it will stay with him, abide with him throughout your deliberations until twelve of you can say to yourselves individually and then collectively, that is to yourself, and then jointly, that the prosecution has proven its case beyond a reasonable doubt. Now if the prosecution has done that, you should convict the defendant. On the other hand, if the prosecution has not proven its case to your satisfaction beyond a reasonable doubt, by proving each and every element of the offense charged against the defendant, then that presumption should ripen into a verdict the not guilty, and you shouldn't hesitate to say that, if that is the situation. That is, that the prosecution has not proven its case beyond a reasonable doubt.

"• • •

"Now members of the jury, I instruct you that in order to constitute this offense it must be shown that the defendant in this case made an assault upon the complaining witness with an actual intent to kill, under such circumstances as would have made the killing murder had death resulted therefrom.

"Now this is known as a specific intent case. And by that I mean this: The intent, so the prosecution claims, was to kill and murder.

"Now murder has been defined as where a person of sound memory and discretion wilfully and unlawfully kills any human being against the peace and dignity of this state, with malice aforethought, expressed or implied.

"Now I defined all of that to you and I hope you retained it. That is what express malice is and implied malice.

"And that word aforethought means before it was done. That there was some thought given to it. That malice—that malice must have existed before the act.

"Assault again is defined as an offer or attempt with force and violence to do a corporal hurt to another, coupled with a present ability to carry the intention into effect.

"Now I just told you what murder is. It is the intent with which the injury is inflicted or attempted. That constitutes a material element of assault with intent to commit the crime of murder. And when such intent is shown, that which would have been only assault, unaccompanied with the felonious intent, will be assault with intent to commit murder when thus accompanied.

"Now this is kind of—well I don't want to use the word tricky, but it's elusive, let me say that. Now let me see if I can nail that down for you.

"If a person assaults another person and that person dies, let's say, and you look in and you see that there was malice aforethought, and that the person who committed the assault was of sound mind and discretion, and there was no justification for it or excuse, then that person would be guilty of murder. Assuming the person died.

"Now let's take the same illustration, and the person does not die, but everything else was present. The person was of sound mind, and he assaulted the person with

malice aforethought, and he had intent to kill and murder, but the person didn't die, then that would be exactly what this case is all about. The only difference is that the person in one instance dies, and in the other instance he or she doesn't die. But all of the elements are there in both instances. The intent to kill and murder, and the assault.

"Now do you get that? All right.

"There is another charge that you may find the defendant guilty of, and it is referred to a lesser included offense. That charge is assault with intent to do great bodily harm less than the crime of murder. Now what does this entail? What does it mean? What is it all about?

"And the law in this case says this: Any person who shall assault another with intent to do great bodily harm less than the crime of murder, shall be guilty. It doesn't say much. But it means this: That if a person assaults another and the intent is to do great bodily harm, but there is no intent to kill and murder, but the injury is great, then it would fit under this law because there would be some elements missing, and one was that there was no intent to kill and murder. The intent is to do great bodily harm but less than murder.

"Now you may find the defendant guilty of that charge.

"So there are two charges that you may find the defendant guilty of. Assault with intent to kill and murder, or assault with intent to do great bodily harm less than murder.

"Now the major charge was brought under a section of law that reads as follows:

'Any person who shall assault another with intent to commit the crime of murder shall be guilty.'

"And the other one just says if you assault a person with intent to do great bodily harm less than murder.

"Now those are the two statutes—The two laws under which this prosecution has been brought.

"Now if you find that the defendant in this case assaulted the complainant is such a reckless, wilful, and wanton manner, and that at the time this assault occurred that he intended to kill and murder—now if you find these things happened beyond a reasonable doubt, then your verdict ought to be guilty.

"If you find that those things did not happen beyond a reasonable doubt, your verdict ought to be not guilty.

"Now I have given you some illustrations. I hope you remember those. That if a person say pointed a gun at a man's toe and shot him, that would be one thing, but if the person pointed the gun at somebody's head and fired on him and later on said well I didn't intend to kill him, I just intended to hurt him, you see the law presumes that any ordinary human being intends the ordinary consequences of his or her acts. You couldn't run back and say, oh, well I didn't intend it to go that far, when you pointed it or you actually fired on somebody at a vital—at a portion of that person's body.

"Now you must keep in view the things that I have said about the defendant's rights. The prosecution must prove him guilty beyond a reasonable doubt. He does not have to do, or prove, or say anything. He did not have to take the stand, and he elected not to. You may not consider that at all."

After the instructions, the prosecutor and defense counsel indicated they had no objections to the charge. TT p 391.

Respondent Burton contends, and the Court of Appeals held, that the instructions unconstitutionally relieved the State of its obligation to prove the element of intent beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION CONCERNING THE APPLICABILITY OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO A SITUATION WHERE NO TIMELY OBJECTION TO JURY INSTRUCTIONS WAS MADE AT THE TRIAL, AND THE STATE APPELLATE COURT MAY NOT HAVE RELIED SOLELY UPON THE FAILURE TO OBJECT AS A BASIS FOR AFFIRMING THE CONVICTION.

It is undisputed that no objection was made at the trial to the jury instructions which are challenged in this habeas corpus proceeding.

By statute, MCLA 769.26; MSA 28.1096, and by court rule, GCR 1963, 516.2, Michigan law requires a contemporaneous objection to preserve an instructional challenge for appellate review, absent manifest injustice. In the instant case, Respondent Burton raised numerous challenges in the state appellate courts, but was denied relief without any discussion on the merits. The Michigan Court of Appeals said:

> "An examination of the records discloses no reversible error. Defendant was not deprived of a substantial right." Appendix 1a.

In support of its decision, the Michigan Court of Appeals cited, but it did not discuss, seven cases from the Michigan Appellate Courts. While it is true that some of the cases involved substantive discussions of various types of instructional challenges, at least four of the seven cases involved discussion of the principle that challenges to jury instructions will not be entertained on appeal absent a timely objection in the trial court.

In *Wainwright* v *Sykes, supra,* 433 US 72 and *Francis* v *Henderson,* 425 US 536 (1976), this Court held that claimed violations of federal law which were not resolved on the merits in the state court proceeding due to a failure to raise them there as required by a state procedure would not be considered in federal habeas corpus proceedings, absent a showing of cause for the failure and actual prejudice. In the instant case, Respondent Burton has shown neither cause nor prejudice and Petitioner submits that because the state court's affirmance of Burton's conviction is substantially based upon Burton's failure to make a timely objection to the jury instructions, the doctrine of *Wainwright* v *Sykes, supra* should apply to bar habeas corpus review of his claim.

The Sixth Circuit Court of Appeals erroneously concluded that the Michigan Appellate Courts did not base their affirmance upon Burton's failure to make a timely objection to the instructions. The Court refused to apply *Wainwright* because it found no "clear state court reliance" on the failure to object which was "unambigiously set forth" in the Michigan Court of Appeal's opinion. *Burton* v *Bergman, supra,* 649 F2d at 430, Slip Opinion pp 3-4, fn. 1 (Appendix 11a).

Wainwright v *Sykes, supra* and *Francis* v *Henderson, supra* enunciate an important principle of federalism, that a federal habeas corpus court ought not to consider claims which were not resolved on the merits in state courts due to a failure to

raise the issue there as required by state procedure. The decision of the Court of Appeals in the instant case undercuts this important principle by applying an overly formalistic analysis of the state court record.

The Michigan Court Rules prohibit appellate review of jury instructions absent timely objection. Undue harshness of this rule is mitigated by the statutory provision which permits appellate review, absent objection, in order to prevent manifest injustice. In practice, the application of these two principles sometimes results in a type of hybrid review. In order to determine whether manifest injustice exists, some limited substantive review must be undertaken, even in the absence of a timely trial objection. That type of review, however, is simply not of the depth and quality which is undertaken when an issue has been preserved by timely objection. Similar difficulties were recently discussed by another panel of the Court of Appeals which enunciated the following standard for application of the *Wainwright* rule, *Hockenbury* v *Sowders*, 620 F2d 111, 115 (CA 6, 1980):

> "In cases such as this where the state court has arguably given more than one reason for the denial of petitioner's claim, we held that the federal court must determine whether the petitioner's failure to comply with the contemporaneous objection requirement was a *substantial basis* of the state court's denial of petitioner's claim." (emphasis added)

In its decision in the instant case, the Court of Appeals has ignored the standard set forth in *Hockenbury* and has, in effect, disregarded the principles underlying *Wainwright*. This Court should grant certiorari in order to clarify the circumstances under which the *Wainwright* rationale is to be applied.

II.

THE POSSIBLE RETROACTIVITY OF SANDSTROM v MONTANA, 442 US 510 (1977), PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHICH THE COURTS OF APPEALS ARE IN CONFLICT AND WHICH SHOULD BE DECIDED BY THIS COURT.

The Court of Appeals below held that *Sandstrom* v *Montana, supra* should be applied retroactively. *Burton* v *Bergman, supra,* 649 F2d at 431; Slip Opinion p 5, fn. 3 (Appendix 12a). The Eighth Circuit has recently reached the same conclusion, *Dietz* v *Solem,* 640 F2d 126 (CA 8, 1981), but the opposite conclusion has been reached in at least one other Circuit, *United States* v *Spiegel,* 604 F2d 961 (CA 5, 1979), *cert den* 446 US 935 (1980). The jury instruction which this Court held unconstitutional in *Sandstrom* was formerly in wide use in many areas including Michigan. Petitioner submits that the *Sandstrom* decision should be given prospective effect only in light of the rules enunciated in *Stovall* v *Denno,* 388 US 293, 296-297 (1967) for determining the applicability of new standards of criminal procedure:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

III.

THE NECESSITY OF RECONCILING SANDSTROM v MONTANA, 442 US 510, WITH CUPP v NAUGHTEN, 414 US 141 (1973), AND THE PROPER APPLICATION OF THE HARMLESS ERROR DOCTRINE OF CHAPMAN v CALIFORNIA, 386 US 18 (1967), PRESENT IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

The Court of Appeals isolated one phrase from one single sentence in a jury instruction which comprises twenty-one pages of trial transcript and found constitutional error which is not harmless beyond a reasonable doubt. Although paying lip service to this Court's decision in *Cupp* v *Naughten, supra,* 414 US 141, petitioner submits that the Court of Appeals did precisely what is forbidden by that decision. They viewed a single challenged instruction in "artificial isolation" rather than in the context of the overall charge. *Cupp* v *Naughten, supra,* 414 US 141 at 146-147. Petitioner submits that when the challenged instruction is properly viewed within the context of the instructions as a whole, it is apparent that the State Trial Court was merely attempting to explain to the jury that intent can be determined only from examining the acts and words of a person. The petitioner submits that the Trial Court's instruction did not have the effect of directing the jury that they were required to find the element of intent to kill merely from the use of a knife, but the instruction merely informed the jury that they could permissibly make such an inference. When viewed in their entirety, petitioner submits the instructions did not violate *Sandstrom* v *Montana, supra.*

Petitioner further submits that even if a constitutional violation is present, it is clearly harmless beyond a reasonable doubt under the rationale of *Chapman* v *California, supra,* 386 US 18, in light of the evidence adduced at trial. Although

the Court of Appeals cited *Chapman, supra,* it declined to declare any constitutional error harmless because despite the overwhelming evidence of Respondent Burton's intent to murder, the Court concluded that the inference of intent to murder, "is by no means inescapable". *Burton* v *Bergman, supra,* 649 F2d, at 432, Slip Opinion, p 6 (Appendix 14a). By requiring the state to prove an "inescapable" inference of intent to commit murder, the majority opinion of the Court of Appeals has applied an impossibly high standard and, in effect, has conclusively presumed any instructional error to be harmful.

This Court should grant certiorari to clarify the relationship between *Cupp* v *Naughten, supra* and *Sandstrom* v *Montana, supra* and to correct the Court of Appeals' erroneous application of the harmless error doctine of *Chapman* v *California, supra.*

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Assistant Attorney General
525 West Ottawa Street
762 Law Building
Lansing, Michigan 48913
(517) 373-1124

Dated: August 12, 1981

Appendix

TABLE OF CONTENTS

Page

1. *People* v *Burton*, unreported Michigan Court of Appeals Opinion, Docket No. 25591 (February 9, 1977) 1a

2. *Burton* v *Bergman*, unreported opinion and order denying writ of habeas corpus, ED Mi 78-71968 (February 4, 1980) 2a

3. *Burton* v *Bergman*, 649 F2d 428 (CA 6, May 21, 1981) Slip Opinion 8a

4. *Burton* v *Bergman*, unreported order denying rehearing CA 6, No. 80-1497 (July 20, 1981) ... 20a

STATE OF MICHIGAN
COURT OF APPEALS

FEB 9, 1977

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ARTHUR JACKSON BURTON, Defendant-Appellant.	No. 25591

Before: M. J. Kelly, P.J., and N. J. Kaufman and D. F. Walsh, JJ.

Memorandum

Defendant was convicted by a jury of assault with intent to kill and murder, contrary to MCLA 750.83; MSA 28.278. Defendant was sentenced on the offense and now appeals alleging various errors in the trial court's jury charge.

An examination of the record discloses no reversible error. Defendant was not deprived of a substantial right. *People* v *Smith*, 68 Mich App 138, 140 (1976), *People* v *Auer*, 393 Mich 667 (1975), *People* v *Smalls*, 61 Mich App 53 (1975), *People* v *Jordan*, 51 Mich App 710 (1974), *People* v *Adams*, 48 Mich App 595, 601 (1973), *People* v *Poe*, 27 Mich App 422 (1970), *People* v *Finley*, 38 Mich 482 (1878).

Affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARTHUR JACKSON BURTON, Petitioner, vs. JACK BERGMAN, Respondent.	CIVIL NO. 78-71968

OPINION

Petitioner, Arthur Jackson Burton, has brought a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He alleges that he was denied due process of law by the trial court's instruction to the jury on intent and reasonable doubt, and that he was denied effective assistance of counsel.

A jury convicted petitioner of assault with intent to commit murder with the trial court sentencing him to life imprisonment. He had attacked a female friend with a knife, stabbed her 43 times in various parts of the body, and then threatened the victim if she informed the police about the identity of her assailant.

A federal court may not ordinarily entertain a petition for habeas corpus relief by a state prisoner unless the petitioner has exhausted his state remedies on the same question presented before the federal court. 28 U.S.C. § 2254(b) and (c); *Picard* v. *Connor*, 404 U.S. 270 (1971); *Ex Parte Royall*, 117 U.S. 241 (1886); *Dombkowski* v. *Johnson*, 488 F.2d 68 (6th Cir. 1973). The exhaustion requirement reflects the principle of comity by giving the state judicial system opportunity to pass upon and correct alleged violations of a state prisoner's

constitutionally protected rights. *Wilwording* v. *Swenson*, 4
U.S. 249, 150 (1971). But, once fully presented to the st
courts, the exhaustion requirement is satisfied. 404 U.S. at 2

Since presentment to state appellate courts is a necess
pre-condition to federal habeas relief, merely seeking
pellate review of some aspect of petitioner's trial is ins
ficient. *Keener* v. *Ridenour*, 594 F.2d 581 (6th Cir. 197
Exhaustion requires that an appeal be taken both to the Mi
igan Court of Appeals and to the Supreme Court of Michig
488 F.2d 68; *Winegar* v. *Corrections Department*, 435 F. Su
285 (W. D. Mich. 1977), *aff'd without opinion*, 582 F.2d 1
(6th Cir. 1978).

The second ground raised by petitioner, ineffective ass
ance of counsel, fails the exhaustion requirement. The is
was neither presented to the Michigan Court of Appeals
presented to the Michigan Supreme Court. As a matter
comity, Michigan appellate courts must have a fair oppor
nity to review rules upon the ineffective assistance iss
See generally, *Fay* v. *Noia*, 372 U.S. 391, 419 (1963).

The first ground raised by petitioner, faulty jury instr
tions, does not rise to a federal constitutional question. G
erally, errors in jury instructions do not involve deprivat
of constitutional rights. *Gemmel* v. *Buchkoe*, 358 F.2d 3
340 (6th Cir. 1966), *cert. denied* 385 U.S. 962, *reh. den*
385 U.S. 1021. "It is only in circumstances impaging fun
mental fairness of infringing specific constitutional protecti
that a federal question is presented." 358 F.2d at 340 (cit
to *Grundler* v. *State of North Carolina*, 283 F.2d 798,
(4th Cir. 1960)). Such a circumstance did not occur in
instant case.

Petitioner cites three parts of the jury instructions to b
tress his contention of fundamental unfairness. First, the

scription of the element of intent was prejudicial and confusing. In his brief to the Michigan Supreme Court, the section of transcript was used as evidence for this argument.

> Now I have given you some illustrations. I hope you remember those. That if a person say pointed a gun at a man's toe and shot him, that would be one thing, but if the person pointed the gun at somebody's head and fired on him and later on said well I didn't intend to hurt him, you see the law presumes that any ordinary human being intends the ordinary consequences of his or her acts. You couldn't run back and say, oh, well I didn't intend it to go that far, when you pointed it or you actually fired on somebody at a vital—at a portion of that person's body. Transcript at 385-386 (herein after known as "Tr. at ....").

The United States Supreme Court has repeatedly held federal courts to be bound by the interpretation placed upon the constitution and statutes of a state by the state's highest court. *Spencer* v. *Texas*, 385 U.S. 554 (1967). Only a totally unsupportable construction which conflicts with considerations of due process becomes a matter for federal habeas corpus relief. *Patterson* v. *New York*, 432 U.S. 197 (1976).

The above quoted section, however, does not evidence any fundamental unfairness. The instruction follows the holding in *People* v. *Cunningham*, 21 Mich. App. 381 (1970), that an intent to do serious injury may be inferred from the seriousness of the injury done and the means used by defendant. This holding was Michigan law for 50 years before petitioner's trial (*People* v. *Smith*, 217 Mich. 669 (1922); *People* v. *Miller*, 91 Mich. 639 (1892)), and is now part of the Michigan standard criminal jury instructions, 2 *Michigan Criminal Jury Instructions* 17-63, 64 (1977).

The second transcript section proffered by petitioner allegedly shows prejudice by the court. The statement is as follows:

> [Court] Now the thing in this case is whom will you believe, that's the question. And believe beyond a reasonable doubt. It boils down to that. Tr. at 386.

It is a basic premise of trial by jury that the jury must decide who to believe. During petitioner's trial, the prosecution presented its case in chief with extensive testimony by the stabbing victim. Defense also offered its theory of the case beyond a reasonable doubt. There is no constitutional violation evident in the quoted section.

The third part of the transcript cited offered the instruction dealing with the description of reasonable doubt.

> Now what is reasonable doubt? A reasonable doubt is just what those words signify. It is a doubt that is based upon reason and common sense. It is a real doubt. It is a fair doubt. It is not a vain imaginary, or a captious doubt. And by that I mean a doubt that you would go outside of the evidence and create, and then indulge in believing in that. That's not the doubt we are talking about. We are talking about a real doubt, a fair doubt, that is based upon reason and common sense.
>
> Now you will note that nobody had mentioned any other kind of a doubt but a reasonable doubt. And that is the doubt that you should concern yourselves with. The prosecution doesn't have to prove its case beyond a reasonable doubt though. Tr. at 378-379.

The above instruction on reasonable doubt is a permissible one. See *People* v. *Hoffman*, 142 Mich. 531 (1905); *People* v. *Barrette*, 233 Mich. 615 (1898). It is not error to charge a

jury under Michigan law that the term reasonable doubt is not meant as a barrier or that the prosecution must prove a defendant guilty beyond any doubt. If that were not true, there could never be a conviction in a case where the defendant pleaded not guilty. Furthermore, the jury was informed that all elements of the crime must be proved beyond reasonable doubt. Taken as a whole, the instruction on reasonable doubt more than adequately protected the rights of petitioner. *Berrier* v. *Egaler*, 583 F.2d 515 (6th Cir.), *cert. denied* 439 U.S. 955 (1978); *see also, DeBerry* v. *Wolff*, 513 F.2d 1336, (8th Cir. 1975).

For these reasons, the Petition for Writ of Habeas Corpus is dismissed.

RALPH B. GUY, JR. /s/
RALPH B. GUY, JR.
UNITED STATES
DISTRICT JUDGE

DATED: FEB 4, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARTHUR JACKSON BURTON, Petitioner, vs. JACK BERGMAN, Respondent.	CIVIL NO. 78-71968

ORDER DENYING WRIT OF HABEAS CORPUS

This matter having come before the court on petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and the court being fully advised in the premises, and for the reasons set forth in the attached Opinion;

IT IS ORDERED that the petition for a writ of habeas corpus in the above entitled case be, and the same is hereby, DENIED.

RALPH B. GUY, JR. /s/
RALPH B. GUY, JR.
United States District Judge

DATED: FEB 4, 1980

No. 80-1497
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR JACKSON BURTON, Petitioner-Appellant, v. JACK BERGMAN, Respondent-Appellee.	On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 21, 1981.

Before: WEICK and MARTIN, Circuit Judges; and NIXON, District Judge.*

MARTIN, Circuit Judge, delivered the opinion of the court, in which NIXON, District Judge, joined. WEICK, Circuit Judge, (pp. 8-10) filed a separate dissenting opinion.

MARTIN, Circuit Judge. Arthur Jackson Burton appeals the District Court's denial of his petition for a writ of habeas corpus. He was convicted in a Michigan state court of assault with intent to commit murder, and sentenced to life imprisonment. He appealed his conviction to the Michigan Court of Appeals, contending that the trial judge's jury instructions were faulty. The conviction was affirmed, and the Michigan Supreme Court denied leave to appeal.

In his petition for habeas relief, Burton alleges 1) that the

trial court's instructions to the jury deprived him of due process of law, and 2) that he was denied effective assistance

*Honorable John T. Nixon, United States District Judge for the Middle District of Tennessee, sitting by designation.

of counsel. The District Court dismissed the first contention on the merits, and refused to entertain the ineffective assistance claim on the ground that petitioner had failed to exhaust his state remedies as required by 28 U.S.C. §§ 2254(b) and (c).

In 1975, petitioner was convicted of assaulting with intent to murder Debra Boulley, his former girlfriend and the mother of their three-year-old daughter. Ms Boulley gave the following account of the incident in her testimony at trial: Burton tricked her into admitting him into the house where she and their daughter were staying. He then held a gun to Ms. Boulley's head. He stated that he was not going to hurt her but that he wanted to discuss her reasons for refusing to see him. She replied that there was no reason for them to see one another. Petitioner removed the bullets from the gun to demonstrate that he was not going to hurt her. Ms. Boulley then attempted to secure herself and her child in the bathroom, but Burton pushed the door open. He stabbed her repeatedly with a pen knife, ransacked the house, and returned to the bathroom to stab Ms. Boulley several more times. In all, petitioner stabbed her approximately forty times in the neck, chest, arms, and back. Finally, he threatened to kill her and their daughter if she informed the police that he was the assailant. In May of 1974, six months after the assault, Ms. Boulley finally told the police that it was petitioner who assaulted her.

Burton did not testify at his trial. The theory of the defense was that the prosecution had failed to prove its case beyond a reasonable doubt.

Petitioner contends that the instructions the trial judge gave to the jury deprived him of his right to due process of law. He cites three segments of the court's charge which, he argues, great bodily harm, or not guilty. With respect to the element of intent. The court instructed the jury that it could find

petitioner guilty of assault with intent to commit murder, guilty of the lesser included offense of assault with intent to do great bodily harm, or not guilty. With respect to the element of intent, the court gave the following instruction:

> Now I have given you some illustrations. I hope you remember those. That if a person say pointed a gun at a man's toe and shot him, that would be one thing, but if the person pointed the gun at somebody's head and fired on him and later on said well I didn't intend to kill him, I just intended to hurt him, you see *the law presumes that any ordinary human being intends the ordinary consequences of his or her acts.* You couldn't run back and say, oh, well, I didn't intend it to go that far, when you pointed it or you actually fired on somebody at a vital—at a portion of that person's body.

Record at 385-6 (emphasis added).

Petitioner claims that this instruction deprived him of his constitutional right under *In re Winship*, 397 U.S. 358 (1970) not to be convicted except upon proof beyond a reasonable doubt of every element of the crime. Respondent contends that the court's comments about presuming intent pertained only to the illustration of a person shooting someone in the head. He further argues that the effect of the instruction was merely to inform the jury that it could infer the element of intent from the facts and circumstances of the case. This was the view adopted by the District Court in its opinion dismiss-

ing the petition. We disagree, and hold that the use of the instruction was constitutional error.[1]

It is true, as respondent argues, that the evidence adduced at trial permits an inference that petitioner assaulted Ms. Boulley with the intent to murder her. It is also true that a

---

[1]

The dissent notes that there was no objection made at trial to the challenged jury instructions. It thus suggests that *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), precludes federal habeas corpus review, an argument not raised here by respondent. However, procedural default only bars habeas relief if the state court relies on the procedural default in affirming the conviction. *County Court of Ulster County* v. *Allen*, 442 U.S. 140 (1979). The memorandum opinion of the Michigan Court of Appeals stated in its entirety:

> Defendant was convicted by a jury of assault with intent to kill and murder, contrary to MCLA 750.83; MSA 28.278. Defendant was sentenced on the offense and now appeals alleging various errors in the trial court's jury charge.
>
> *An examination of the record discloses no reversible error. Defendant was not deprived of a substantial right. People* v. *Smith*, 68 Mich App 138, 140 (1976), *People* v. *Auer*, 393 Mich 667 (1975), *People* v. *Smalls*, 61 Mich App 53 (1975), *People* v. *Jordan*, 51 Mich App 710 (1974), *People* v. *Adams*, 48 Mich App 595, 601 (1973), *People* v. *Poe*, 27 Mich App 422 (1970), *People* v. *Finley*, 38 Mich 482 (1878).
>
> Affirmed.

(emphasis added). It is true that some of the cases cited by the opinion are procedural waiver cases, thus indicating that the appellate court may have been "thinking in procedural terms." *Brown* v. *Reid*, 493 F.Supp. 101, 103 (S.D.N.Y. 1980). However, we find it significant that the language of the opinion so clearly relies on an adverse determination of the merits of petitioner's claim. We express no view on what effect a clear state court reliance on non-compliance would have upon us. We hold only that no such ground of decision is unambiguously set forth in this record, and therefore we do no violence to the principles of federalism underlying *Wainwright* by deciding the merits of the federal claim.

jury may properly be instructed that it may infer intent from the circumstances or that it may infer that a person intends the ordinary consequences of his acts. *See, e.g., Krzeminski* v. *Perini*, 614 F.2d 121, 124 n.4 (6th Cir.), *cert. denied*, —— U.S. ——, 101 S.Ct. 199 (1980). *See also Sandstrom* v. *Montana*, 422 U.S. 510, 527 (1979) (Rehnquist, J., concurring).

In this case, however, the trial court instructed the jury that the law *presumes* that a person intends the ordinary consequences of his acts.[2] There was no qualifying instruction concerning the legal effect of the presumption. *See Sandstrom*, supra, at 517.[3] It is possible that a reasonable jury might have interpreted the instruction in one of two ways: either as a direction to find against petitioner on the element of intent upon proof of his voluntary actions and

---

[2]

The dissent suggests that the use of the word "presume" instead of the word "infer" should not have such drastic consequences. In response we need only quote from Justice Rehnquist's concurring opinion in *Sandstrom, supra*, 442 U.S. at 528:

> While I continue to have doubts as to whether this particular jury was so attentively attuned to the instructions of the trial court that it divined the difference recognized by lawyers between "infer" and "presume," I defer to the judgment of the majority of the Court that this difference in meaning may have been critical in its effect on the jury. I therefore concur in the Court's opinion and judgment.

[3]

We hold that the rule in *Sandstrom* must be applied retroactively. We are not certain that *Sandstrom* announces a new constitutional principle; it seems to be simply an application of the principle established by *Winship*. *See Lee* v. *Missouri*, 439 U.S. 461, 462 (1979). However, even if *Sandstrom* articulates a new rule, the major purpose of the rule is to overcome an aspect of the trial that substantially impairs its truth finding function and raises serious questions about the accuracy of guilty verdicts in past trials. For that reason the rule must be applied retroactively. *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977). *See also Washington* v. *Harris*, 502 F.Supp. 1267, 1273 n.8 (S.D.N.Y. 1980). *Contra, United States* v. *Spiegel*, 604 F.2d 961 (5th Cir. 1979), *cert, denied*, 446 U.S. 935 (1980).

their "ordinary" consequences; or as a direction to find against petitioner upon proof of voluntariness unless the defendant made a showing to the contrary. Either interpretation would have deprived petitioner of due process of law. *Id.* at 517-18, 524. *See also United States* v. *Reeves*, 594 F.2d 536 (6th Cir.), *cert. denied*, 442 U.S. 946 (1979), where we specifically recommended a definition of intent which, in our view, did not contain any burden shifting implications; and *United States* v. *Bohlmann*, 625 F.2d 751 (6th Cir. 1980).

We do not, by following *Sandstrom*, reject the rule that a challenged instruction "may not be viewed in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973). Rather, we believe that the trial court's instruction created a substantial risk that the jury would believe the presumption provided the necessary proof of petitioner's intent beyond a reasonable doubt.

Respondent contends that even if the instruction was erroneous, the error was harmless. We are, of course, bound by the standard announced in *Chapman* v. *California*, 386 U.S. 18 (1967): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id* at 24. We must

grant the petition if we find that there is a reasonable possibility that the challenged instruction might have contributed to the conviction. *Id.*

When the evidence of guilt properly admitted at trial is overwhelming, an error of constitutional dimension may be deemed harmless. *Harrington* v. *California*, 395 U.S. 250 (1969); *Mitchell* v. *Engle*, 634 F.2d 353 (6th Cir. 1980). The

evidence in this case of petitioner's intent to murder includes: the number and location of the stabbings, petitioner's statements to Ms. Boulley at the time of the incident that he would choke her, and the repeated subsequent threats upon her life and the life of their child.

Nevertheless, the inference that petitioner intended to murder Ms. Boulley when he assaulted her is by no means inescapable. According to Ms. Boulley, she and petitioner were "going together" from the end of 1968 until 1973. In 1970, she gave birth to their child. There was evidence in a letter admitted as a state's exhibit that petitioner's threats towards Ms. Boulley were intended only to frighten her so that she would visit him. There was further evidence that at the time of the assault and afterward petitioner wanted to resume his previous relationship with Ms. Boulley. Under these circumstances, we cannot conclude that the evidence of petitioner's intent to murder was so overwhelming as to render the erroneous instruction harmless.

Respondent, citing our decision in *Reeves, supra,* contends that any error in the instruction on intent was harmless because petitioner's intent was never placed in issue. We strenuously disagree with the premise of this argument and with respondent's interpretation of *Reeves.*[4] In a criminal case,

---

[4]

In that case the appellant sought reversal of his federal conviction of armed bank robbery. We held that a burden shifting instruction concerning the element of intent was error. However, we observed that

> [I]n this case the criminal intent of the person who robbed the bank was never placed at issue. Appellant's defense was simply that he was not the person who did it. This issue was clearly presented to the jury with the burden of proof beyond reasonable doubt placed squarely on the government. More than adequate evidence to support the jury verdict was presented . . . . Under these circumstances, we find the error in the charge to be harmless beyond a reasonable doubt. 594 F.2d at 538.

every element of the crime charged is necessarily placed in issue: "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship, supra,* 397 U.S. at 364. In our view, the erroneous instruction may have relieved the state of its obligation to prove the requisite intent beyond a reasonable doubt. If the trial court had refrained from giving the improper instruction, the jury might have entertained a reasonable doubt that petitioner assaulted Ms. Boulley with the intent to murder her. Such an error cannot be harmless. *Cf. United States* v. *Boyd,* 620 F.2d 129 (6th Cir.), *cert. denied,* —— U.S. ——, 101 S.Ct. 151 (1980).

In light of our decision on this issue, we need not address petitioner's other contentions.

The judgment of the District Court is reversed, and the case is remanded for the issuance of a writ in the customary form which allows the state to retry Burton within a reasonable period of time in lieu of releasing him outright.

In *Reeves,* the evidence presented at trial and the appellant's defense indicated that the element of intent was not a critical question. In that sense, it was not placed in issue. It still, of course, had to be proven beyond a reasonable doubt. Our point was simply that the circumstances of that case – the absence of conflicting evidence regarding the appellant's intent – were more conducive to a finding of harmless error than circumstances in which intent became a critical issue at trial. In the present case, the record suggests that the issue of petitioner's intent was crucial.

WEICK, Circuit Judge, dissenting:

I respectfully dissent. Because of a single word in comprehensive unobjected to jury instructions, where the court used the word "presume" instead of "infer" the state court conviction of the defendant of assault with intent to commit murder is collaterally attacked and set aside by the majority. The conviction had been affirmed by the Michigan Court of Appeals and leave to appeal was denied by the Supreme Court of Michigan. Habeas relief was denied by a district judge knowledgeable of Michigan law, by long experience, who found no prejudicial error in the instructions.

It is the well established rule that even in a direct appeal from a conviction which is attacked on the ground of an alleged erroneous instruction, that all of the instructions and not one single instruction or word must be considered in determining the issue. *Cupp* v. *Naughten*, 414 U.S. 141, 146, 147 (1973). When this rule is correctly applied, as did the district judge, it will be seen that no prejudicial error occurred.

Previous to the instruction now objected to, the court had charged the jury on the subject of intent as follows:

> So how do you determine a person's intent? And it states right here. You may infer from what is said and what is done. Now that's a sure-fire proposition. You take into consideration what the person says, and what the person does, and you ought to be able to determine his intent is. For instance, if I had a gun—you will have to excuse me—Mr. Wyse [the prosecuting attorney], you're the object today—and I pointed it at his toe and I actually shot him in the toe. I would think that would indicate that I intended to hurt him but not to kill him.

> Now let's say I took that gun and I aimed it as his h
> and I pulled that trigger. Now I think the intent th
> would be to kill him, to get rid of him. And that's w
> I mean by considering the acts and the words of a per
> in determining what that person intends to do.

No. 80-1497 *Burton* v. *Bergman*

The court gave correct instructions on the offense of assa
with intent to commit murder, presumption of innocen
reasonable doubt, and on the lesser included offense of assa
with intent to commit bodily injury.

After the court instructed the jury, the record discloses
following:

> THE COURT: Wait a minute. Are there any objecti
> to the court's charge?
> MR. MOLETTE: No, your honor.
>
> THE COURT: All right.
>
> MR. WYSE: No objections, your honor.
>
> THE COURT: All right. Thank you.

Thus, both counsel stated to the court that they had
objection to the instructions. Had objection been made, t
court would then have had an opportunity to rule on t
objection and correct the instruction if it was erroneous.

Michigan applies the contemporaneous objection rule. *Peop*
v. *Townes*, 391 Mich. 578 (1974). This is also the fede
rule. Rule 30, Fed. R. Crim. P. Under both rules, howev
because of the supervisory jurisdiction of the reviewing cour
manifest and serious errors may be considered even n
objected to. No such error existed in the present case.

The majority opinion graphically relates the heinous crime committed by the defendant as follows:

> Ms. Boulley gave the following account of the incident in her testimony at trial: Burton tricked her into admitting him in to the house where she and their daughter were staying. He then held a gun to Ms. Boulley's head. He stated that he was not going to hurt her but that he wanted to discuss her reasons for refusing to see him. She replied that there was no reason for them to see one another. Petitioner removed the bullets from the gun to demonstrate that he was not going to hurt her. Ms. Boulley then attempted to secure herself and her

> child in the bathroom, but Burton pushed the door open. He stabbed her repeatedly with a pen knife, ransacked the house, and returned to the bathroom to stab Ms. Boulley several more times. In all, petitioner stabbed her approximately forty times in the neck, chest, arms and back. Finally, he treatened to kill her and their daughter if she informed the police that he was the assailant.

This evidence was not seriously controverted. After seriously injuring and maiming her by the repeated stabbings, Burton declined to even call an ambulance to take her to the hospital until she took an oath not to tell the police. When she was taken to the hospital, she was placed in intensive care suffering from the mutilation of her body.

At the trial in the state court, the defendant did not even take the witness stand to deny the stabbings. He questioned the sufficiency of the evidence, but this was for the state courts and not for us to decide in a habeas proceeding. The

verdict of the jury was supported by overwhelming uncontroverted evidence as was held by the state courts as well as by the district judge. Even if a small part of the state judge's instructions to the jury was erroneous, the error was harmless beyond a reasonable doubt and we should so hold. *Chapman* v. *California*, 386 U.S. 18 (1967).

The district court was correct in ruling that appellant had not exhausted his state remedies with respect to his belated contention made for the first time in the federal court that he did not have effective assistance of counsel.

We should follow the principles of federalism and not collaterally attack the factual determinations of state courts in criminal proceedings where there is some evidence to support them as was held by the district court. The judgment of the district court denying the writ of habeas corpus should be affirmed.

FILED — JUL 20 1981 — JOHN P. HEHMAN, Clerk

No. 80-1497

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR JACKSON BURTON, Petitioner-Appellant v. JACK BERGMAN, Respondent-Appellee	**ORDER**

Before: WEICK and MARTIN, Circuit Judges; and NIXON, District Judge.*

The petition for rehearing with suggestion of rehearing en banc filed by the respondent-appellee having come on for consideration, and of the Judges of this court who are in regular active service less than a majority having favored ordering consideration en banc (Judge Weick favored rehearing en banc), the petition for rehearing has been referred to the hearing panel.

Upon consideration of the petition for rehearing the court concludes that the issues raised therein were fully considered upon submission and decision of the case.

Accordingly, the petition for rehearing is hereby denied. Judge Weick dissents.

ENTERED BY ORDER OF THE
COURT
JOHN P. HEHMAN, CLERK
Leonard Green /s/
Chief Deputy Clerk

* Honorable John T. Nixon, United States District Judge for the Middle District of Tennessee, sitting by designation.

Opposition

Office - Supreme Court, U.S.
FILED
SEP 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-310

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JACK BERGMAN, Warden

Petitioner,

v.

ARTHUR JACKSON BURTON,

Respondent.

MEMORANDUM IN OPPOSITION OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KATHLEEN C. KING
Attorney for Respondent
1401 Dixie Highway
Covington, Kentucky 41011
Phone: (606) 292-5340

COUNTERQUESTIONS PRESENTED FOR REVIEW

I. Where the state appellate court did not appear to rely on defense counsel's failure to object to jury instructions in affirming the lower court's conviction; and where that conviction is successfully challenged in federal habeas corpus proceedings; may the state belatedly raise the principles enunciated in Wainwright v. Sykes, 443 U.S. 72 (1977) in the United States Supreme Court?

II. Should that portion of In re Winship, 397 U.S. 358 (1970) which dealt with the prosecution's burden of proving each and every element of a crime beyond a reasonable doubt and which was later reiterated in Sandstrom v. Montana, 442 U.S. 510 (1979) be applied to a 1975 state court conviction?

III. If Sandstrom and In Re Winship are to be applied to a 1975 case, do the state court's instructions that a jury should presume that a man intends the ordinary consequences of his acts violate the principles of due process enunciated in Sandstrom and In Re Winship?

IV. If the state court's jury instructions in this case violate Sandstrom and In Re Winship, can the violation be considered harmless when ample evidence indicated that, had the jury been properly instructed, it may have found Respondent-Appellee not guilty or guilty of a lesser included offense?

TABLE OF CONTENTS

Page

COUNTERQUESTIONS PRESENTED FOR REVIEW i

INDEX OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, & COURT RULES INVOLVED 1-2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT

I. THE STATE APPELLATE COURT CLEARLY STATED ITS RELIANCE ON THE MERITS WHEN AFFIRMING RESPONDENT'S CONVICTION, FORECLOSING PETITIONER'S TARDY ARGUMENT THAT WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) BARS FEDERAL HABEAS CORPUS REVIEW 3-4

II. IN RE WINSHIP, 397 U.S. 358 (1970) ESTABLISHES THE PRINCIPLE THAT THE PROSECUTION HAS THE BURDEN OF PROVING EACH AND EVERY ELEMENT OF A CRIME BEYOND A REASONABLE DOUBT; THE REAFFIRMATION OF THIS PRINCIPLE IN SANDSTROM V. MONTANA, 442 U.S. 510 (1979) DOES NOT PRECLUDE PROSPECTIVE APPLICATION OF IN RE WINSHIP. 5-6

III. BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED CUPP V. NAUGHTEN, 414 U.S. 141 (1973) AND CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967), NO IMPORTANT QUESTIONS OF FEDERAL LAW EXIST WHICH SHOULD BE DECIDED BY THIS COURT. 7-9

CONCLUSION 9

APPENDIX

INDEX OF AUTHORITIES

CASES	PAGE
Burton v. Bergman, 649 F2d 428 (CA6, 1981)	4
Chapman v. California, 386 U.S. 18 (1967)	8,9
Cupp v. Naughten, 414 U.S. 141 (1973)	7
Hockenbury v. Sowders, 620 F2d 111 (CA6, 1980)	4
In Re Winship, 397 U.S. 358 (1970)	5
People v. Adams, 210 NW 2d 888 (1973)	4
People v. Auer, 227 NW 2d 528 (1975)	4
People v. Jordan, 216 NW 2d 71 (1974)	4
People v. Miller, 91 Mich. 639 (1892)	5
People v. Poe, 183 NW 2d 628 (1970)	4
People v. Smalls, 232 NW 2d 298 (1975)	4
People v. Smith, 242 NW 2d 42 (1976)	4
People v. Smith, 217 Mich. 669 (1922)	5
Sandstrom v. Montana, 442 U.S. 510 (1979)	5,6
Stovall v. Denno, 388 U.S. 293 (1967)	5,6
Sumner v. Mata, 101 S. Ct. 764 (1981)	3
United States v. Spiegel, 604 F2d 961 (CA5, 1979 cert den 446 U.S. 935 (1980)	5
Wainwright v. Sykes, 433 U.S. 72 (1977)	3
STATUTES	
MCLA 750.84	1,8
CONSTITUTIONAL PROVISIONS	
Fifth Amendment to the U.S. Constitution	2
Fourteenth Amendment to the U.S. Constitution	2

No. 81-310

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JACK BERGMAN, Warden

Petitioner,

v.

ARTHUR JACKSON BURTON,

Respondent.

MEMORANDUM IN OPPOSITION OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Petitioner has correctly stated the opinions below. (Petitioner's Brief, pages 1 and 2).

JURISDICTION

Petitioner has correctly stated his view of jurisdiction. (Petitioner's Brief, page 2).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

In addition to those constitutional provisions, statutes, and court rules cited by Petitioner, the following are also applicable:

MCLA 750.84

> Assault with intent to do great bodily harm less than murder: Any person who shall assault another with the intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison, not more than 10 years, or by a fine of not more than 5,000 dollars.

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner correctly stated the majority of the case. However, Burton denies that the Trial Court correctly informed the jury about "the concept of reasonable doubt, and the prosecution's burden of proving each and every element of the offense." (Petitioner's Brief, page 5). Burton does not raise the Trial Court's definition of beyond a reasonable doubt here, because the Sixth Circuit Court of Appeals did not decide that issue. (Petitioner's Appendix, page 15a).

In addition to that which was outlined in Petitioner's statement of the case, the Trial Court also instructed the jury that:

> Now the thing in this case is whom you will believe, that's the question. And believe beyond a reasonable doubt. It boils down to that. (T.T., page 386).

Also, it is alleged that Burton did, in fact, call an ambulance for the prosecuting witness. (T.T., page 45).

REASONS FOR DENYING THE WRIT

I.

THE STATE APPELLATE COURT CLEARLY STATED ITS RELIANCE ON THE MERITS WHEN AFFIRMING RESPONDENT'S CONVICTION, FORECLOSING PETITIONER'S TARDY ARGUMENT THAT WAINWRIGHT v. SYKES, 433 U.S. 72 (1977) BARS FEDERAL HABEAS CORPUS REVIEW.

Throughout state appellate procedures, Respondent Burton alleged a denial of due process because the Trial Court instructed the jury that the law presumed a man intends the ordinary consequences of his acts. In reviewing Burton's complaint, the Court of Appeals did not direct its words to counsel's failure to object to those instructions, but affirmed Burton's conviction because "Defendant was not deprived of a substantial right." The Court of Appeals did cite seven cases in support of its decision. (Petitioner's Appendix, page 1a). The State of Michigan now contends that the recitation of those seven cases precludes Burton, under Wainwright v. Sykes, 433 U.S. 72 (1977), from federal habeas corpus proceedings. Burton denies that this fact situation presents an important federal question for three reasons:

First, Bergman did not raise Wainwright v. Sykes, supra, in the Sixth Circuit Court of Appeals until it filed its suggestion for a rehearing en banc. (Appendix, pages 10 through 15). A similar oversight occurred in Sumner v. Mata, 101 S. Ct. 764 at 773 (1981), where the petitioner failed to raise the argument that 28 U.S.C. 2254 (d) barred federal court consideration until a motion for reconsideration. In his dissent, Justice Brennan, with whom Justices Marshall and Stevens joined, expressed dissatisfaction with overturning the Court of Appeal's decision where the petitioner had been so tardy with his argument. Burton contends that it is patently unfair for the United States Supreme Court to consider the Wainwright v. Sykes doctrine when it was not raised in a timely fashion.

Secondly, the Michigan Appellate Court clearly passed on the merits of Burton's case. This is true despite Petitioner's contention that four of the seven cases cited involved discussion of the principle that jury instruction challenges won't be entertained on appeal absent a timely objection. A review of six of the seven cases demonstrates that the primary thrust of the cases involved the question of whether or not instructions were erroneous when "read as a whole." People v. Smith, 68 Mich. App. 138, 242 NW 2d 42 (1976); People v. Auer, 393 Mich. 667, 227 NW 2d 528 (1975); People v. Smalls, 61 Mich. App. 53, 232 NW 2d 298 (1975); People v. Jordan, 51 Mich. App. 710, 216 NW 2d 71 (1974); People v. Adams, 48 Mich. App. 595, 210 NW 2d 888 (1973); People v. Poe, 27 Mich. App. 422, 183 NW 2d 628 (1970). One of the cases cited dealt with the same issue on intent as is present in Burton's case. There, the court reversed the lower court, saying:

> Defendant's failure to object to the erroneous instructions is not fatal to his position. It is error for the trial court to give a misleading or erroneous instruction which results in a miscarriage of justice denying defendant a fair trial. (Citations omitted). People v. Jordan, 51 Mich. App. 710, 216 NW 2d 71, 75 (1974).

Consistent with its holding in Hockenbury v. Sowders, 620 F2d 111, 115 (CA6, 1980), the Sixth Circuit determined that the language of the opinion clearly relied on an adverse determination of the merits and not counsel's failure to object. Burton v. Bergman, 649 F2d 428, (CA6, May 21, 1981). (Petitioner's Brief, page IIa, Footnote 1).

Finally, Wainwright v. Sykes, supra, allows federal review where there is a cause for a failure to object and an effect. Burton has alleged that the cause was ineffective assistance of counsel. There can be no trial strategy reason for relieving the state of its burden to prove all elements. Burton alleges that the effect was an unjust conviction for assault with intent to murder.

II.

IN RE WINSHIP, 397 U.S. 358 (1970) ESTABLISHES THE PRINCIPLE THAT THE PROSECUTION HAS THE BURDEN OF PROVING EACH AND EVERY ELEMENT OF A CRIME BEYOND A REASONABLE DOUBT; THE REAFFIRMATION OF THIS PRINCIPLE IN SANDSTROM V. MONTANA, 442 U.S. 510 (1979) DOES NOT PRECLUDE PROSPECTIVE APPLICATION OF IN RE WINSHIP.

Petitioner argues that this court ought to determine the retroactivity of Sandstrom v. Montana because there is a conflict between the circuits. In support of this contention, Petitioner cites United States v. Spiegel, 604, F2d 961 (CA5, 1979), cert den 446 U.S. 935 (1980) as being contrary to the holding in Burton's case. This is an incorrect reading of Spiegel.

The Fifth Circuit noted that the Spiegel instruction was quite different than the instruction in Sandstrom. According to the Sandstrom instruction as well as in the instant case, the law presumes a man intends the ordinary consequences of his acts. The Spiegel instruction informed the jury that it might infer intent from knowing acts. Because no conflict exists between the circuits, this court should deny the petition for a writ of certiorari.

In Re Winship, 397 U.S. 358 (1970), decided five years before Burton's jury trial, firmly established the principle that the prosecution has the burden of proving each and every element of a crime beyond a reasonable doubt. Sandstrom merely reaffirmed that holding. Consequently, the Sixth Circuit did not need to discuss the test for retroactive application as set out in Stovall v. Denno, 388 U.S. 293, 296-297 (1967). Sandstrom does not exclude prospective application of In Re Winship.

Even if Stovall v. Denno were to be applied, Sandstrom should receive retroactive effect. The purpose of the so-called "new" standard in Sandstrom is not to prohibit overzealous police activities nor

to instruct appellate courts to include certain language in their decisions. The Sandstrom principle goes to the very core of our criminal justice system: to insure that people are not convicted of crimes they did not commit. When a Supreme Court decision speaks to protecting accused individuals, as opposed to protecting procedure, the decision should be applied retroactively.

Petitioner maintains that the Sandstrom instruction has been widely given and, using the test in Stovall v. Denno, should be prospectively applied. Petitioner does not include any cases, court rules or statutes in support of this contention. As a matter of fact, for many years it has been Michigan law that an intent to do serious injury may be inferred from the seriousness of the injury done and the means used. People v. Smith, 217 Mich. 669 (1922); Michigan v. Miller, 91 Mich. 639 (1892). It was considered to be reversible error for the court to instruct a jury that "there is a presumption at the outset that the defendant intends the consequences of his acts..." People v. Jordan, 51 Mich. App. 710, 216 NW 2d 71, 75 (1974). Michigan law has, in fact, been consistent with the holding in Sandstrom.

A final Stovall v. Denno question must be asked: What is the affect on the administration of justice if retroactive application is given? Burton admits that the judicial system may be put to some inconvenience retrying select cases. However, the release of those individuals who have been convicted of crimes they didn't commit significantly outweighs that relatively minor inconvenience.

III.

BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED CUPP V. NAUGHTEN, 414 U.S. 141 (1973) AND CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967), NO IMPORTANT QUESTIONS OF FEDERAL LAW EXIST WHICH SHOULD BE DECIDED BY THIS COURT.

Petitioner maintains that the Sixth Circuit isolated one phase of the jury instructions and viewed it in "artificial isolation" contrary to Cupp v. Naughten, 414 U.S. 141 (1973). (Petitioner's Brief, page 10). This is untrue. The Trial Court did use the words "may infer" on occasion. However, the total effect of the instructions was to encourage a finding of guilty by presuming intent from Burton's alleged actions.

The Trial Court first stated its opinion that, if a man fired at another's head, there was an intent to kill. (Petitioner's Brief, page 6). Later, the Trial Court repeated the example and invited the jury to view the permissible inference as an irrebuttable presumption by saying:

> ...you see the law presumes that any ordinary human being intends the ordinary consequences of his or her acts. You couldn't run back and say, oh, well, I didn't intend it to go that far. (Petitioner's Brief, page 11).

These two errors were compounded by the Trial Court's invitation to find Burton guilty when instructing that:

> Now let's take the same illustration, and the person does not die, but everything was present. The person was of sound mind, and he assaulted the person with malice aforethought, and he had intent to kill and murder, but the person didn't die, then that would be exactly what this case is all about. (Petitioner's Brief, pages 9,10).

Despite the fact that the jury was given an instruction on the lesser-included offense of assault with intent to do great bodily harm,

MCLA 750.84, the Trial Court greatly discouraged a finding of guilty to that lesser charge in two ways.

First, the Trial Court instructed that, if the jury found Burton intended to kill and murder, then the verdict should be guilty. If it did not find those things to have happened beyond a reasonable doubt, the jury was to find Burton not guilty. (Petitioner's Brief, page 11). The clear suggestion to the jurors was that a guilty finding on a lesser-included offense was not appropriate in the judge's view.

Secondly, the Trial Court instructed the jury thusly:

> Now the thing in this case is whom will you believe, that's the question. And believe beyond a reasonable doubt. It boils down to that. (T.T., page 386).

The jury may have found beyond a reasonable doubt that defendant assaulted the complaining witness. At the same time, it may have found proof of intent to murder wanting. Both findings are consistent with the complaining witness' story that Burton assaulted her, carried her into the bedroom, and then called the ambulance. In sum, it was possible for the jury to believe the complaining witness entirely and find Burton guilty of a lesser charge. The court's instruction foreclosed this range of choices from the jury's consideration and increased the likelihood that the jury viewed the permissible inference on intent as an irrebuttable presumption.

Petitioner argues that, even if the instructions were erroneous, the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). The Sixth Circuit Court of Appeals gave several reasons that the error was not harmless. (Petitioner's Appendix, page 14a). Additionally, it should be noted that Burton is alleged to have taken, consistent with a lack of intent to kill, the following actions:

1). Removed bullets from his gun and put the gun down. (Petitioner's Brief, page 3).

2). Carried the prosecuting witness into the bedroom and laid her down on the bed. (Petitioner's Brief, page 5).

3). Called the ambulance with the prosecuting witness' agreement not to tell anyone who hurt her. (Petitioner's Brief, page 5 and T.T., page 45).

4). Told the prosecuting witness that he would let her live. (Petitioner's Brief, page 5).

It should also be recognized that there are serious questions concerning the veracity of the prosecuting witness. Had Burton actually assaulted her, she had plenty of opportunities to report the assault before she did. (Petitioner's Brief, page 5). Thus, the Sixth Circuit properly applied Chapman, leaving no important federal question for this court to decide.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiori to review the judgment and opinion of the Sixth Circuit Court of Appeals should be denied.

Respectfully Submitted,

Kathleen C. King

Kathleen C. King
Attorney for Respondent
1401 Dixie Highway
Covington, Kentucky 41011
Phone: (606) 292-5340

CERTIFICATION OF SERVICE

I hereby certify that a copy of this Memorandum has been forwarded to Thomas L. Casey, Asst. Attorney General, 525 West Ottawa Street, 762 Law Building, Lansing, Michigan 48913 on this 8th day of September, 1981.

Kathleen C. King
Kathleen C. King

Appendix

No. 80-1497

In The

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARTHUR JACKSON BURTON,

Petitioner-Appellant,

v

JACK BERGMAN, Warden,

Respondent-Appellee.

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

NOW COMES Respondent-Appellee by and through his attorneys Frank J. Kelley, Attorney General, Robert A. Derengoski, Solicitor General, and Thomas L. Casey, Assistant Attorney General, and pursuant to Fed R App P 40, 35 and Sixth Circuit Rule 14, petitions this Court for a rehearing of the opinion filed May 21, 1981 in the above-entitled case, and suggests that the rehearing be en banc, and in support thereof says as follows:

1. In this habeas corpus proceeding challenging a 1975 state court conviction, a panel of this Court reversed the District Court in a divided opinion and ordered that the writ be granted unless the Petitioner is retried within a reasonable period of time. In reaching that conclusion, a majority of the panel determined that the state court jury instructions, "may have relieved

the state of its obligation to prove the requisite intent beyond a reasonable doubt." Slip opinion, p 7.

2. Petitioner did not object to the state court jury instructions in a timely manner as required under Michigan law. See, e.g., Michigan General Court Rules 1963, 516.2, which provides in pertinent part:

> "no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the grounds of his objection."

Respondent therefore submits that the challenge to the jury instructions may not be reviewed in this habeas corpus proceeding because of Petitioner's failure to comply with Michigan's contemporaneous objection requirement and because Petitioner has failed to show cause for the failure to object and actual prejudice. Wainwright v Sykes, 433 US 72 (1977). The majority opinion in the instant case declined to rely upon Wainwright, apparently because it believed that the state appellate court did not rely upon the failure to object when it affirmed Petitioner's conviction. Slip opinion, pp 3-4, fn 1. The majority found "that no such ground of decision is unambiguously set forth in this record" and expressed no view on what effect "a clear state court reliance on non-compliance would have". In reaching that conclusion the majority opinion clearly conflicts with this Court's recent holding in Hockenbury v Sowders, 620 F2d 111, 115 (CA 6, 1980) where this Court applied a

less stringent standard than utilized by the majority in the instant case. In Hockenbury this Court noted the difficulty in determining whether a state court reviewed a constitutional claim on its merits or refused to review it on procedural grounds and enunciated the following standard for application of the Wainwright rule, 620 F2d at 115:

> "In cases such as this where the state court has arguably given more than one reason for the denial of petitioner's claim, we hold that the federal court must determine whether the petitioner's failure to comply with the contemporaneous objection requirement was a substantial basis of the state court's denial of petitioner's claim." (emphasis added).

In the instant case the panel required more than a "substantial basis"; they required "a clear state court reliance upon non-compliance" which is "unambiguously set forth". Slip opinion, p 4, fn 1. In the instant case the majority noted that the Michigan Court of Appeals opinion affirming Petitioner's conviction is somewhat terse, but did observe that several of the cases cited by the Michigan Court of Appeals relied upon the procedural ground of failure to object rather than a determination of the merits. Nevertheless, the majority declined to apply the Hockenbury standard and further declined to apply the Wainwright rule to the instant case.

3. The majority opinion in the instant case incorrectly gave retroactive application to the rule announced in Sandstrom v Montana, 422 US 510 (1979) which found constitutional error in a

state court jury instruction which was said to have unconstitutionally created a conclusive presumption or a shifting of the burden of persuasion on the element of intent. See slip opinion, p 5, fn 3. In reaching this conclusion the majority opinion noted that other courts have reached the opposite conclusion. See United States v Spiegel, 604 F2d 961 (CA 5, 1979), cert den 446 US 935 (1980). Because instructions similar to that in the instant case were routinely given in many state courts, including Michigan, for many years, retroactive application of the Sandstrom principle could have an extremely detrimental impact on the administration of justice. Because of the potential impact of retroactive application of Sandstrom, Respondent Warden submits that the determination of retroactivity presents a question of exceptional importance which ought to be determined only by the entire court, rather than by a two-judge majority composed of one circuit court judge and one visiting district court judge.

4. Even if Petitioner is deemed entitled to challenge the state court jury instructions in this habeas corpus proceeding despite timely objection in the state courts, and even if Sandstrom is given retroactive application, Respondent submits that the majority opinion in the instant case nevertheless misapplied the facts in the instant case when it concluded that the instant instructions are governed by the Sandstrom rule and that any error is not harmless beyond a reasonable doubt. In the instant case the challenged instruction was but a small part of the totality of instructions on the question of intent and Respondent submits that

when the instructions are viewed in the context of the overall charge, it simply cannot be concluded that this single isolated passage resulted in constitutional error. See Cupp v Naughten, 414 US 141 (1973). Even if constitutional error is found, Respondent submits that the majority opinion misapplies the harmless error doctrine enunciated in Chapman v California, 386 US 18 (1967). In Chapman the Supreme Court held that even constitutional error may not require vitiating an otherwise valid state court conviction where the error "was harmless beyond a reasonable doubt." 386 US at 24. In the instant case, the majority opinion while citing the appropriate standard, held that the evidence against Petitioner was insufficiently overwhelming since "the inference that Petitioner intended to murder Ms. Boulley when he assaulted her is by no means inescapable." Slip opinion, p 6. By requiring the state to prove an "inescapable" inference of intent to commit murder, the majority opinion has applied an impossibly high standard and, in effect, has conclusively presumed the instructional error to be harmful.

WHEREFORE because the majority decision of the panel is contrary to Hockenbury v Sowders, supra, because it incorrectly gives retroactive application to Sandstrom v Montana, supra, because it incorrectly applies the facts of this case to the Sandstrom standard, and because it misapplies the harmless error doctrine of Chapman v California, supra, Respondent urges this Court to grant rehearing en banc and to rehear the case after additional briefing and argument.

5

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Assistant Attorney General
525 West Ottawa Street
762 Law Building
Lansing, Michigan 48913
(517) 373-1124

Dated: June 3, 1981

Office Supreme Court, U.S.
FILED
SEP
ALEXANDER L. STEVAS,
CLERK

No. 81-310

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JACK BERGMAN, Warden

Petitioner,

v.

ARTHUR JACKSON BURTON,

Respondent.

MOTION TO PROCEED IN
FORMA PAUPERIS

Now comes Respondent Burton, by and through counsel, and moves the court to permit him to proceed in forma pauperis. For cause, Respondent states that his attorney in the Sixth Circuit Court of Appeals, Kathleen C. King, was appointed in accordance with the Criminal Justice Act. This appointment was the result of Respondent's inability to pay for his own representation.

Respectfully submitted,

Kathleen C. King

Kathleen C. King
Attorney for Respondent
1401 Dixie Highway
Covington, Kentucky 41011
Phone: (606) 292-5340

CERTIFICATION OF SERVICE

I hereby certify that a copy of this motion has been forwarded to Thomas L. Casey, Assistant Attorney General, 525 West Ottawa Street, 762 Law Building, Lansing, Michigan 48913 on this 9th day of September, 1981.

Kathleen C. King
Kathleen C. King